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Supreme Court of the United States.

OCTOBER TERM, 1905.

Supreme Court U. S.
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No. 244.

ALLAN L. McDERMOTT, RECEIVER OF THE CITY AND SUBURBAN RAILWAY OF WASHINGTON, PLAINTIFF IN ERROR,

vs.

CHARLES B. SEVERE, BY WILLIAM B. SEVERE, HIS NEXT FRIEND, DEFENDANT IN ERROR.

Supplemental Brief on Behalf of Plaintiff in Error.

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FIRST.

Did the trial court commit error in refusing to grant prayer No. 2 of plaintiff in error on the subject of the alleged defective construction of the platform?

In addition to what was said in the main brief, we desire to stress the following:

(*a*) The plaintiff in error did not ask for an instruction to the effect that the platform was not defectively constructed—it was sought to have the court leave that question to the jury.

(*b*) The standard of duty and care which this prayer sought to have the court give to the jury was that of other people engaged in the same line of work, i. e., the character of platform construction usually and generally adopted by others, *provided that actual experience had shown the character of the structure to be ordinarily*

safe; and provided further, that a reasonably prudent man would not have anticipated such an accident from such construction. When this prayer is analyzed, three things must concur before plaintiff in error could be acquitted of the charge of a negligent construction of the platform:

(1) That persons engaged in the same occupation uniformly built platforms of this character in the same way.

(2) That such construction was found by experience everywhere to be safe.

(3) That the character of the construction was such that a reasonably prudent man would not have anticipated injury of the character complained of by the defendant in error.

(*c*) It will not suffice to say that the trial judge cured the error complained of in his general charge to the jury. If the plaintiff in error correctly stated the law in its second prayer, it was well within its legal right to have the court announce to the jury the standard of duty set out in that prayer. The trial judge in his general charge was silent on that particular subject. It may be that what he did say was sound law as far as it went, but it is contended that the plaintiff in error was entitled to have the court furnish the jury a standard by which the conduct of the plaintiff in error could be safely and fairly measured. This right was denied, and hence error is assigned.

SECOND.

Did the trial court commit error in refusing to grant the third, fourth, fifth, and sixth prayers of the plaintiff in error?

The court's attention is particularly called to the following observations:

(*a*) While the third prayer, left to itself, confined as

it was to the conduct of the motorman in stopping the car, may possibly go too far in asking for a verdict for the defendant, the fourth prayer, which was also refused, completely states the case of the defendant in error and should have been granted, if, as a matter of law, the motorman performed his full duty when he commenced to stop the car as soon as he discovered that the defendant in error was unable to leave the track.

(*b*) For the purposes of this case, it is admitted that the motorman did all in his power to stop the car as soon as he saw that the defendant in error was unable to leave the track. This being true, it became a very pertinent question to be answered, how could the plaintiff in error be guilty of negligence in the improper management of the car.

(*c*) The only other acts of negligence alleged in the declaration as to the operation of the car are the failure to give signals and excessive rate of speed just prior to the accident. The motorman testified that when within about 150 feet of the defendant in error and his brothers, he repeatedly sounded his gong (Rec., p. 19). There is no evidence whatever to the contrary.

The car was traveling at about eight or nine miles an hour (R., p. 20). There is no evidence to the contrary. Doubtless this court will take judicial cognizance of the facts that street-cars are allowed by the District regulations to run in the District of Columbia, within the city limits, at the rate of twelve miles an hour, and that there is no limit of speed in the country. At any rate, in the absence of any testimony on the subject, this court will not conclude that a speed of eight or nine miles an hour for a street-car at Riverdale, Md., and on a perfectly straight track is excessive. Counsel for defendant in error vainly suggest that a high rate of speed can be inferred from the fact that the car jolted when it stopped. The motorman testified that

he reversed his current and put on his brakes when he was within 35 or 40 feet of the defendant in error; this would surely have caused the car to jolt quite severely; such a jolt would be felt at almost any speed. Nor can this inference of excessive speed be fairly drawn from the distance the car traveled after the motorman reversed his current and put on his brakes. The motorman himself testified that he was within 30 or 35 feet of the defendant in error when he commenced to stop his car (R., p. 20). The defendant in error and his brothers testified that the car was about 45 feet away when the motorman commenced to stop it (Rec., pp. 10–16 and 17). The contention by counsel for the defendant in error that the car traveled 115 feet is pure guesswork. It is admitted that the motorman began to stop the car when within 35 or 40 feet of the defendant in error, that the boy was somewhere on the platform, and that the car came to a full stop at about the south end of the platform, but it is nowhere stated whether or not reference was made to the rear or front end of the car in this last statement. The most natural inference to be drawn from the testimony is that the motorman succeeded in stopping the car within a few feet of the place of the accident. But even assuming that the car ran the distance stated by counsel for the defendant in error, to wit, 115 feet, that furnishes no evidence whatever that the car was running at an excessive rate of speed. Assuming for the purposes of the argument that the car was running at ten miles an hour, it would traverse the 115 feet in less than eight seconds.

(*d*) In view of the consent finding that the motorman did all in his power to stop the car after he saw that the defendant in error could not leave the track and the further fact, which seems indisputable, that there were no acts of negligence established against the plaintiff in error with reference to the management of the car otherwise, all else must pass out of the case against the plain-

tiff in error, except the single allegation of negligent and defective construction of the platform. If this be true, and if there was error on the part of the trial court in refusing the instruction submitted on that subject by the plaintiff in error, the judgment must be reversed and a new trial ordered.

THIRD.

Measure of Damages.

As will be seen by a reading of the main brief of plaintiff in error, two errors were assigned on this subject:

(1) Allowance of damages for mental suffering.

(2) Allowance of damages for loss of earning capacity.

The first proposition is sufficiently covered in the main brief, and it is unnecessary to add thereto.

There was obvious error, it is respectfully submitted, on the part of the trial judge in telling the jury that damages could be assessed to the defendant in error for loss of his earning capacity. It seems to be well settled law that the earnings of a minor belong to the parent.

In the case of Peppercon *vs.* Black River Falls, 89 Wis., p. 38, it was held that the trial court committed no error in refusing to allow the plaintiff compensation for loss of time during her minority from inability to labor by reason of the injury. The court in substance held that, it not appearing that the minor had been emancipated, the services during the period of her minority belonged to her father and not to her.

In the case of Forsythe *vs.* Central Manufacturing Company, 113 Tenn., 498, it was held that the widowed mother of an infant could recover damages for loss of the services of her son, notwithstanding the fact that there had been a recovery by the infant for damages for the injury to his person. The court said:

> "The right of a parent to maintain such an action is not affected by the previous recovery by the child for injuries sustained by himself."

In Railroad Company *vs.* Young, 81 Ga., 410, it was held that a child could not recover damages for inability to perform labor during minority, where the inability was caused by the injury complained of. The cases in 108 Mo., p. 16, and 119 Mo., page 277, cited in brief of defendant in error, support the contention here that damages for loss of earning capacity, by reason of an injury, are limited to the time after the minor attains his majority. In support of the same proposition the court's attention is called to the following cases:

R. R. Co. *vs.* Boozer, 70 Texas, 530.
R. R. Co. *vs.* Robertson, 16 S. W. Rep., 1093.
R. R. Co. *vs.* Grisom, 82 S. W. Rep., 671.

The plaintiff in error was entitled to have the court state the law to the jury on the subject of damages in plain and simple language, intelligible to the ordinary mind and free from doubt.

D. C. *vs.* Holton, 15 D. C. App., 389.

But in the case at bar the Court of Appeals held that the plaintiff in error had not excepted to the rulings of the trial judge with sufficient definiteness. The court's attention is called to the fact that the plaintiff in error did specifically except to the prayer of the defendant in error which related to the single subject of damages. Of course, a general exception to the general charge has been held over and over again to be too indefinite to furnish a basis for an assignment of error, but that is not the case here, nor does the case at bar come within the reason of the rule just stated. The general charge not only may, but generally does, cover a number of subjects, and the party excepting to it must specifically except to a particular part of the charge, so that each exception will challenge the correctness of one particular proposition. The reason that underlies the practice of separately

numbering prayers submitted by the respective parties is that the court should have an opportunity of passing on one specific proposition of law at a time. Under such a practice an exception taken to the ruling of the court on a prayer submitted, of necessity, challenges the correctness of the court's conclusion on one particular subject, and hence the practice is time-honored of excepting specifically to the action of the court on each prayer. To require the exceptant to do more than this, when he complains of the action of the court on one specific proposition of law, would, of necessity, make difficult and cumbersome the practice and procedure in the courts. If the party excepting to one particular prayer is called upon to point out sentences, or parts of sentences, or phrases, or words, regarded as objectionable, and to furnish a prayer in lieu of the one objected to, and hence, of necessity, to give his reasons for his objections to the one and in support of the other, it will eventuate that arguments of counsel will constitute the average bill of exceptions.

In the case of Moore *vs.* R. R. Co., 2 Mackey, D. C., 449, it was in effect decided that if an exception is specially taken to the granting of each prayer, it will be sufficient. In that case there were three prayers asked for by the plaintiff, and were granted. The counsel for the defendant apparently, as a matter of precaution, excepted generally to the granting of all three of the prayers, but did not take an exception to each prayer separately. The court held that that was irregular, but that it would have been sufficient if the exception to the prayers had been separately noted. In the case of Edgington *vs.* United States, 164 U. S., 364 (referring to an exception to a portion of the general charge), this court said:

> "Some criticism is offered to the exception as made to the whole paragraph, and thus coming

> within cited cases, to the effect that exceptions are not well taken to an entire charge, or to large portions of a charge, if the instructions complained of are, as to some of them, sound. There is a reasonable rule that if the entire charge is excepted to, or a series of propositions contained in it is excepted to in gross, the exception can not be sustained if there were a distinct proposition or instruction given that was sound. Waiving the question as to how far this rule is justly applicable to the case of a charge in a criminal case, we are of opinion that, in the present instance, the criticism is not well founded. The paragraph of the charge excepted to does not contain instructions on separate and distinct propositions, some of which are sound and others not so. The subject treated of in the paragraph is a single one of the proper effect to be given by the jury to the evidence of the defendant's good character. A fair understanding of the meaning of the instruction can not be reached without reading and weighing the entire paragraph. There would have been more room for just criticism had the defendant taken exception to sentences or phrases detached from their connection."

In the case of Brown *vs.* United States, 164 U. S. 224, the court said:

> "The defendant at the time of the delivery of the charge, and before the jury retired, as appears by the bill of exceptions allowed by the presiding judge, alleged exceptions 'to all the remarks of the court in reference to the impeachment of the witness Sam Manus,' and 'to that part of the charge in regard to the evidence of Sam Manus;' and thereby distinctly and sufficiently excepted to the instruction just quoted."

If it be sound law that the defendant in error was not entitled to have damages assessed to him for loss of earning capacity during his minority, the instructions of

the court on that subject were obviously and inevitably misleading. It will not do to say that it was the duty of the jury to skip the whole period of the minority of the defendant in error, which covers a period of over fourteen years, and assess damages from and after that period. The vice of such a proposition is manifest. The jury is entitled to have the law given to it by the court, and it should not be expected to guess the law and then speculate as to its duties and powers in assessing damages. The inability of the defendant in error to earn money during the period of his minority would of necessity be regarded by the jury as a most substantial element of damage, and the error on this particular subject doubtless accounts for the excessive verdict rendered by the jury.

But counsel for defendant in error claim that the father of the child could not now sue in his own name for loss to him of the earning capacity of the child during minority, for the reason that he appeared at the trial of the present case and testified on behalf of his son. The doctrine of estoppel can not be stretched to any such extent as this. This precise point has been decided by the Court of Appeals of Texas.

R. R. Co. *vs.* Grisom, 82 S. W. Rep., p. 671.
R. R. Co. *vs.* Boozer, 70 Texas, p. 530.

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